No. 10940

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ETHEL STRICKLAND ROGAN, as Executrix of the ESTATE OF NAT ROGAN, Collector of Internal Revenue for the Sixth District of California, Deceased,

Appellant,

vs.

CATHERINE B. FERRY, as Executrix of the Last Will and Testament of PETER FERRY, Deceased,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

BRIEF FOR THE APPELLANT.

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No. 10946

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ETHEL STRICKLAND ROGAN, as Executrix of the ESTATE OF NAT ROGAN, Collector of Internal Revenue for the Sixth District of California, Deceased,

Appellant,

vs.

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Appellee.

BRIEF FOR THE APPELLANT.

Opinion Below.

No formal opinion was handed down by the District Court in this case. Findings of fact and conclusions of law were filed by the court. [R. 45-67.] The case is not reported.

Jurisdiction.

This appeal involves federal estate taxes. The taxes in dispute were paid as follows [R. 458-462]: $16,905.17 on June 1, 1936; $48,500 on April 8, 1937; $15,000 on April 30, 1937; $8,000 on June 12, 1937; $33,675 on July 27, 1937; and $3,106.85 on November 29, 1936. Appellee

filed a claim for refund, hereinafter more particularly referred to, in the amount of $63,825.77 on February 9, 1939. [R. 462-463.] The claim for refund was rejected by notice dated October 18, 1940. Within the time provided in Section 3772 of the Internal Revenue Code and on March 5, 1942, appellee brought an action in the District Court for the recovery of a portion of the federal estate taxes paid on behalf of the estate of Peter Ferry, deceased. [R. 2-11.] Judgment in favor of appellee in the sum of $63,825.77, with interest from the date of the payment of the tax, was entered on April 19, 1944. [R. 68-70.] Within three months and on July 18, 1944, a notice of appeal was filed. [R. 71.] The jurisdiction of this Court is invoked under Section 128(a) of the Judicial Code, as amended. The appellee claims and the appellant denies that the District Court had jurisdiction over the claim under Section 3772(a)(1) of the Internal Revenue Code, providing that no suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any sum alleged to have been excessive, or in any manner wrongfully collected, until a claim for refund has been duly filed with the Commissioner, according to the provisions of law in this regard and the regulations of the Secretary of the Treasury established in pursuance thereof. While, as above stated, a claim was filed on February 9, 1939, it is appellant's contention that there is a variance between the basis of the claim for refund and the grounds upon which the case was presented and tried in the District Court. The judgment below was rendered on issues not presented in the claim for refund.

Question Presented.

Whether the issue or grounds upon which the judgment was based was contained in a claim for refund or in any amendment to the claim. In other words, was the Commissioner of Internal Revenue ever afforded the opportunity to pass on a claim based on the grounds presented to the District Court and decided in favor of appellee?

Statute and Regulations Involved.

Internal Revenue Code:

SEC. 3772. SUITS FOR REFUND.

(a) *Limitations.*—

(1) *Claim.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof. [26 U. S. C., 1940 ed., Sec. 3772.]

* * * * * * * *

Treasury Regulations 80 (1934 ed.):

Art. 99. *Claim for refund.*—A claim for refund of estate tax, or for refund of interest or penalties, erroneously or illegally collected should be made on the form prescribed by the Treasury Department (Form 843), and should be filed with the collector of internal revenue, although a claim will not be considered defective solely by reason of the fact that

it is not made on the form or that it is filed with the Commissioner of Internal Revenue. The claim must set forth in detail and under oath each ground upon which a refund is claimed, and facts sufficient to apprise the Commissioner of the exact basis thereof. Any claim which does not comply with the requirements of the preceding sentence will not be considered for any purpose as a claim for refund.

* * * * * * * *

Statement.

The findings of the District Court, which included the stipulation of facts [R. 457-561], are substantially as follows [R. 45-62]:

Peter Ferry died a resident of California on June 16, 1935. Appellee is decedent's widow and the executrix of his estate. [R. 457.] She filed on June 1, 1936, with the Collector of Internal Revenue at Los Angeles, a federal estate tax return [R. 458] on behalf of the estate, reporting a net estate for the tax imposed under the Revenue Act of 1926 of $162,537.99 and a net estate for the additional tax imposed by the Revenue Act of 1932 of $212,537.99. [R. 491.] A total net tax of $16,905.17 was reported and paid at the time of the filing of the return. [R. 458.] After audit and review of the return the Commissioner of Internal Revenue determined that the correct tax liability of the estate amounted to $147,273.32. [R. 461, 500-501.] The additional taxes were paid to the Collector of Internal Revenue in 1937 and 1938. [R. 458-460.] The deficiency resulted primarily from the inclusion in decedent's taxable estate of the entire value, as of the date of decedent's death, of the *corpus* of five trusts [R.

49, 463-465] and the inclusion of the entire value, as of the date of decedent's death, of certain life insurance policies issued on the life of decedent, which policies aggregate in value $331,632.72. [R. 57.] The value of the property of the five trusts included by the Commissioner of Internal Revenue in the estate aggregated $608,289.71. [R. 463-465.] The five trust indentures, above referred to, contained provisions that the decedent could, with the consent of certain of the beneficiaries, revoke, alter or change the trusts. [R. 516-517, 527, 539, 546, 559.]

The findings of the District Court are also to the effect that appellee filed, on behalf of the estate, on February 9, 1939, a claim for refund with the Collector of Internal Revenue, in the amount of $63,825.77. [R. 45, 462, 509.] All of the pertinent portions of the claim for refund reads as follows [R. 504-505, 506-507, 508]:

> "That on the above date a Federal estate tax return was duly filed by claimant for the estate of Peter Ferry, claimant's deceased husband, and payment of the tax, $16,905.17, was made at that time. Subsequently further payments were made at different periods in contemplation of deficiencies certain to be assessed against the estate, which payments were acknowledged by the Collector for the Sixth district of California in a letter of July 28, 1938 to claimant. Also, an additional payment of $3,106.85 was made on November 29, 1938.
>
> "The first deficiency was assessed against the estate in a notice sent from the Commissioner of Internal Revenue to claimant on August 4, 1937. Other assessments against the estate were made from time to time.

"That among the items included in the first deficiency tax assessed were (1) increase in valuation of insurance policies over the values claimed when the estate tax return was filed and (2) certain transfers by the decedent and his wife of their property in trust as follows, in the order in which they appear on the return, Form 706.

Item 1—Trust No.	6204	$195,850.37
Item 2— " "	2012	82,289.16
Item 3— " "	S-5869	108,363.36
Item 4— " "	SS-4358 and 4358-A	95,182.02
Item 5— " "	P-1052	125,604.80[1]
Item 6— " "	S-1080	2,547.74

"That each of these trusts were included in the decedent's gross estate under the provisions of Section 302(c) and/or (d) of the Revenue Act of 1926, as amended, and, moreover, the full value of each, with the exception of Trust No. S-1080, was included to become a part of the deficiency, and in this respect the claimant alleges as follows:

* * * * * * * *

"That in each and every of said trusts it will be noted that both the decedent and his wife are the trustors. The creation of such trusts effected between the decedent and his wife a property settlement agreement to the effect that each would be vested at the time of the creation of each of said trusts with an undivided one-half (½) interest in the property which comprised the *corpus* of the trust. In California a husband and wife may make a property settlement agreement. See Section 158, California

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[1]This figure is stipulated to be in the amount of $126,604.80. [R. 464-465.]

Civil Code. In California contracts may be either expressed or implied. See Section 1619, California Civil Code. An implied contract is one the existence of terms of which is manifested by conduct. See Section 1621, California Civil Code.

"That it can not be doubted that in the instant matter the decedent and his wife by their conduct in placing their property in trust effected a property settlement agreement and that, therefore, each would be the owner at the time of the creation of such trusts of an undivided one-half (½) interest in the property comprising the *corpus* of said trusts as hereinbefore stated; that, therefore, no more than one-half (½) of the value of the *corpus* of such trusts would be included in the gross estate of the decedent for federal estate tax purposes. Further, if the trusts had been revoked or could have been revoked, the property would have vested in the decedent and his wife as tenants in common, since upon the revocation of a trust the *corpus* of such trust revests in the trustors thereof. See Section 2280 of the California Civil Code. Such transfers, therefore, should not be included in the gross estate of the decedent to the full extent of their value but, at most, should be included only as to one-half (½) of the value of the *corpus* of said trusts.

* * * * * * * *

"That the community interest of the decedent's wife should not be included in the valuation of the insurance policies as it was in the deficiency assessment (*Lang v. Commissioner,* 304 U. S. 264), and the values claimed in the estate tax return filed are the true values of such insurance policies.

"Claimant is informed and believes and therefore states that the agent based his denial of the contentions made herein by reason of the Commissioner's

failure to acquiesce in the case of *Goodyear v. U. S.*, 99 Fed. (2d) 523. The facts of the instant matter we respectfully submit, come squarely within the principles laid down in the *Goodyear* case, and only by reason of the nonacquiescence of the Commissioner in said case has the instant overpayment as herein set forth arisen.[2]

On or about April 4, 1940, appellee filed with the Commissioner of Internal Revenue a protest. [R. 22-27, 47.] The protest is as follows [R. 23-24, 26-27]:

"Protestant is dissatisfied with the proposed determination and assigns errors specifically as follows:

First: That the Commissioner has erred in increasing the gross estate by including therein certain trusts specifically set out in the Commissioner's letter of August 4, 1937.

Second: That the Commissioner erred in increasing valuations of items of insurance as set out in his said letter of August 4, 1937.

Third: That the Commissioner erred in refusing to allow the full amount of deductions shown in the Federal Estate Tax Return filed and in allowing only the amount of deductions to the extent of the value of the probate estate.

That with respect to 'First' and 'Third' all of the statements contained in protest dated October 29,

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[2]Since the issue before this Court is whether the claim, or the claim and protest or protests taken together, presented the grounds upon which the judgment was based, it is considered appropriate to set forth herein the relevant portions of the claim and the protests of April 4, 1940, and October 29, 1937.

1937, and heretofore filed,[3] protesting the determinations made in your letter of August 4, 1937, together with all of the allegations contained in claim for refund executed and dated on or about February 10, 1939, and filed on or about February 20, 1939, are herein realleged and incorporated as though fully set forth herein and thereby made a part hereof.

From the foregoing, your protestant alleges that a sum greatly in excess of the amount claimed in the Federal Estate Tax Return should be excluded from the gross amount of insurance payable by reason of the death of said decedent. That your protestant is desirous of cooperating fully with your office and will attempt to furnish such additional information as your examining officer may deem necessary, in so far as her ability will provide.

In conclusion, your protestant submits that only one-half of the *corpus* of the said trusts should have

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[3]The protest dated October 29, 1937, referred to in the protest of April 4, 1940, is similar, in its grounds and allegations, to the claim and to the protest of April 4, 1940. The pertinent portions of the 1937 protest reads as follows [R. 916, 917]:

> "In each and every of said trusts it will be noted that both the decedent and your protestant are the trustors. The creation of such trusts effected between the decedent and your protestant a property settlement agreement to the effect that each would be vested at the time of the creation of each of said trusts with an undivided one-half (½) interest in the property which comprised the *corpus* of the trust.
>
> * * * * * * *
>
> "It cannot be doubted that in the instant matter the decedent and protestant by their conduct in placing their property in trust effected a property settlement agreement and that, therefore, each would be the owner at the time of the creation of such trust of an undivided one-half (½) interest in the property comprising the *corpus* of said trust, as hereinbefore stated; that, therefore, no more than one-half (½) of the value of the *corpus* of such trusts would be included in the gross estate of the decedent for Federal estate tax purposes. * * *

been included in decedent's gross estate; that a sum greatly in excess of that claimed in the Federal Estate Tax Return should have been excluded from the insurance payable by reason of decedent's death; that the deductions taken by the estate of decedent should have been allowed in full and should not have been limited to the amount of debts and deductions payable out of said probate estate.

* * * * * * * *

From the foregoing, therefore, it is urgently requested that reconsideration be made by your office with respect to the proposed determinations incorporated in your letter of August 4, 1937, and the proposed determinations reported in your letter of February 20, 1940, and that a statement of protest of protestant dated October 29, 1937, and the claim for refund heretofore filed herein, and this protest be given your deep consideration and that upon such reconsideration in the light of the foregoing, protestant's claim be allowed."

The claim for refund filed February 9, 1939, was rejected by the Commissioner of Internal Revenue and notice thereof, dated October 18, 1940, was given the appellee. [R. 463, 509-511.] The grounds upon which the claim was rejected is set forth in the notice of rejection as follows [R. 509-511]:

"Reference is made to the claim on Form 843 filed on February 9, 1939, on behalf of the above-named estate for the refund of $63,825.77, Federal estate tax paid, 'or such greater amount as is legally refundable with interest.' The claim involves two issues, first, as to whether the amount of $32,561.48, representing proceeds of insurance payable to beneficiaries other than the estate in excess of the $40,000.00

exemption, should be included in the gross estate of the decedent; and the other as to whether the amount of $610,837.45, representing property transferred prior to the enactment of section 161(a) of the California Code, is includible in the gross estate to the extent of the entire *corpus* thereof on the basis of the terms of certain trust instruments.

That in addition, your protestant refers to the case of Hill, 24 B. T. A. 1144, and the decisions of the California Courts therein cited.

That with respect to the second error herein assigned your petitioner alleges that the premiums paid for the insurance policies included in decedent's Federal Estate Tax Return and set forth in your letter of August 4, 1937, were paid for out of the community income of decedent and his wife acquired from and after July 29, 1927, and from the separate property of decedent and from the separate property of decedent's wife. That in that connection the facts are:

Decedent owned and operated a business known as Peter L. Ferry, which business carried on a street paving enterprise. That Peter L. Ferry carried on said business as the sole proprietor and as an individual. That the total value of all assets of the business on February 29, 1927 was not in excess of $25,000.00. That the physical assets of the business play a very minor part in the income produced by said business and received by said decedent. That the major factor in producing income from said business was the experience in said business of Peter L. Ferry, his contacts in getting the business, and his ability to carry out the contracts, his reputation in the business and his personal skill.

That all of the income derived by said Peter L. Ferry from the street paving and contracting business

should be assigned to his personal services and none thereof to the physical assets of the business.

The said Peter L. Ferry and his wife carried a joint bank account at all times herein material, into which were deposited the community earnings of Peter L. Ferry and his wife, the separate earnings of his wife, and his own separate income. That from said joint bank account were paid all of the bills of decedent and his wife. That the amount of money in said bank account on August 1, 1927 was $5,-650.23.

* * * * * * * *

Premiums were paid on the insurance policies from the bank account of decedent and his wife in the American National Bank of Glendale, California, and the First National Bank of Glendale. That your protestant will furnish to the examining officer a statement of the payment of premiums on each of the insurance policies upon his request, showing payment of premiums from and after July 29, 1927 to the date of decedent's death.

With respect to the first issue you contend that the life insurance policies should not be taxed in full, but an allowance should be made of the claimed community interest stated to be vested in you. You rely on the case of *Lang v. Commissioner,* 304 U. S. 264 (20 A. F. T. R. 1251) and the case of *Elizabeth C. McCoy, Administratrix,* 37 B. T. A. 114.

The Bureau has considered the cases cited and is of the opinion that they are not controlling in this case. It appears that all of the policies in this case were taken out by the decedent upon his own life. They were the usual standard form of policy, giving his legal incidents of ownership such as changing the beneficiary, assignment and the like. They thus

come within the express wording of Article 25 of Estate Tax Regulations 80. No evidence has been submitted showing that any part of the premiums was paid out of community funds.

With respect to the second issue you contend that the six trusts are taxable only to the extent of one-half because the establishment of the trusts amounted to a property settlement between the decedent and yourself, giving you a vested interest therein.

It appears that the corpus of all six of the trusts was acquired by the decedent during coverture prior to the enactment of section 161(a) of the California Civil Code giving the wife a vested interest in the community. Prior to the enactment of this section of the Code, the wife had a mere expectancy in the community. The rights of the husband were so complete that the husband was the owner of the community. *U. S. v. Robbins,* 269 U. S. 315. The fact that the wife became a cotrustor is therefore without significance or effect. She contributed nothing of her own and her participation was a mere formality.

It is contended that the legal effect of these trusts was to constitute the wife a tenant in common with her husband in the corpus thereof. There is nothing to indicate that the wife acquired any additional property or property rights by becoming a signatory to the trust instruments. It may be assumed, without conceding that upon revocation of any of the trusts the corpus by the terms of the instruments would have become the property of the trustors, in which event a tenancy in common might have been created. However, none of the trusts was revoked during the decedent's lifetime. The fact remains that the transfers were made by decedent after the enactment of the Revenue Act of 1924, and the decedent reserved the power, to alter, revoke or amend the

trusts, with the concurrence of certain (but less than all) of the beneficiaries, and such power was in existence at the date of decedent's death. The transfer, therefore, comes within section 302(d) of the Revenue Act of 1926.

On the basis of the foregoing, and since there does not appear to be an overpayment of Federal Estate tax in this case, the claim filed on February 9, 1939, for the refund of $63,825.77 is rejected in its entirety."

The District Court found that [R. 53]:

"* * * immediately prior to the marriage of plaintiff, Catherine B. Ferry, and said decedent, Peter L. Ferry, in the year 1906, they entered into an agreement with each other to the effect that immediately upon marriage they would become equal financial partners and that all earnings and all property theretofore or thereafter acquired by either or both of them, would be owned equally and 50-50 by them and that all property acquired by either or both of them would be owned jointly and all losses by either or both of them would be shared equally."

The court concluded that because of the agreement of 1906 [R. 63-64]:

"* * * Catherine B. Ferry owned one-half (½) of all property transferred at any time to each and every trust included by the Commissioner of Internal Revenue in the gross estate of said decedent, * * * and that one-half (½) of the value of the corpus of each and every trust was not includable in the gross estate of said decedent and that one-half (½) of the value of the corpus of each and every trust was not subject to Federal Estate Tax * * *."

Further, because of the agreement of 1906 [R. 62]:

> "* * * one-half (½) of the value of the proceeds of all the insurance policies upon the life of Peter Ferry, should not have been included in the gross estate of said decedent * * * and should have been excluded from the gross estate * * * in determining the taxable gross estate of said decedent for Federal Estate Tax purposes."

Statement of Points to Be Urged.

1. The District Court erred in admitting evidence of and basing its decision on an oral agreement between appellee and decedent in 1906, relative to the property comprising the corpus of five trusts and to the funds used for the payment of the premiums on the life insurance, where, as here, the claim for refund and any amendments thereto were based on other and different grounds.

2. The court erred in that there is no evidence to support its findings that the Commissioner considered and acted on the grounds for recovery asserted by appellee in her "Pre-Trial Brief" and "the grounds of recovery upon which the decision in this matter by the within Court are based, and the grounds of recovery adduced at the trial."

3. The court erred in admitting evidence of or considering in its findings or conclusons any evidence to the effect that appellee's separate funds were used to pay premiums on the decedent's life insurance, since the claim for refund, and any amendments thereto, was based on other and different grounds.

4. The court erred in admitting evidence of and considering in its findings and conclusons any evidence relative to the trust property or any portion thereof having been held in joint tenancy or tenancy in common, since the claim for refund and any amendments thereto was based on other and different grounds.

Summary of Argument.

The District Court erred in admitting evidence and deciding this case on issues not raised in appellee's claim for refund or in any amendment thereto. The claim was based on the grounds that the execution of certain trust instruments made appellee a contributor of one-half of the corpora thereof, and on the grounds that she had a vested community property interest in the premiums used to pay decedent's life insurance. The District Court gave judgment to appellee on the grounds that she owned one-half of all the property by reason of an oral agreement between appellee and decedent, entered into in 1906, and on the grounds that one-half of the life insurance premiums were paid from her own or separate funds. The variance between the claim for refund and the grounds upon which the judgment is based requires reversal.

ARGUMENT.

Judgment in This Case Is Based on Grounds Not Presented in the Claim for Refund.

It is well settled that a suit for the recovery of federal taxes must be grounded on a claim for refund. Section 3772 of the Internal Revenue Code, *supra,* formerly Section 3226 of the Revised Statutes, as amended by the Revenue Act of 1932, c. 209, 47 Stat. 169, Section 1103(a). This Court stated the rule that the suit must be based on the grounds set forth in the claim for refund in *B. F. Goodrich Co. v. United States,* 135 F. (2d) 456, affirmed, 321 U. S. 126, as follows (p. 461):

> "The only logical conclusion that can be drawn from a consideration of §3226 is that the claim for refund, which must be filed with the Commissioner as a condition precedent to maintaining a suit for recovery of a tax, is the identical claim upon which said suit must be based. * * *"

The holding of this Court in that case is well supported by the authorities. See *Tucker v. Alexander,* 275 U. S. 228; *United States v. Felt & Tarrant Co.,* 283 U. S. 269; *Maryland Casualty Co. v. United States,* 251 U. S. 342; *United States v. Memphis Cotton Oil Co.,* 288 U. S. 62; *Angelus Milling Co. v. Commissioner,* 325 U. S. 293, rehearing denied, June 18, 1945.

The claim for refund and the protests filed by appellee, in so far as are relevant to this appeal, are based solely on the grounds as follows:

1. That one-half of the corpora of the five trusts, here involved, should be excluded from decedent's tax-

able estate because the creation of the five trusts and the execution of the trust instruments [R. 506]:

> "* * * effected between the decedent and his wife a property settlement agreement to the effect that each would be vested at the time of the creation of each of said trusts with an undivided one-half (½) interest in the property which comprised the corpus of the trust. * * *"

2. That there should be excluded from decedent's taxable estate that portion of the life insurance on decedent's life attributable to the premiums paid from appellee's community interest in the community property acquired after July 29, 1927, the effective date of Section 161(a) of the California Civil Code. Those were the only grounds mentioned and passed on by the Commissioner of Internal Revenue in his letter of rejection. Appellee conceded that the corpora of the five trusts and the proceeds of the life insurance, other than the contributions thereto by appellee, were properly taxed. [R. 88.]

Appellee tried the case below on the following grounds:

1. That one-half of the corpora of the five trusts, here involved, should be excluded from decedent's taxable estate on the grounds that appellee and decedent entered into an oral agreement in 1906, to the effect that they would each own one-half of all property acquired by either during marriage, and that as a consequence decedent's contribution to the corpora of the trusts did not exceed one-half of the total thereof. [R. 77.]

2. That one-half of the proceeds of the life insurance should be excluded from decedent's taxable estate on the

grounds that appellee paid one-half of the premiums from her separate funds.

The court below based its judgment in favor of appellee on the finding that under the oral agreement between appellee and decedent, entered into in 1906, appellee was the owner and the contributor of one-half of the corpora of the five trusts here involved and that she paid from funds belonging to her one-half of all the premiums on the life insurance policies. [R. 55-62.] It is submitted that there exists a fatal variance between the grounds alleged in the claim for refund and the grounds upon which the judgment was based.

The District Court found that [R. 61]:

> "* * * the grounds of recovery adduced at the trial of the issues in the within matter were each and all fully considered and acted upon by the Commissioner of Internal Revenue in the rendition of his final determination of the liability of said estate of Peter L. Ferry for Federal Estate Tax; * * *"

That finding is not supported by any of the evidence but is contrary to all of the evidence in this case. The existence of an oral agreement between appellee and decedent, entered into in 1906, is not stated or intimated in the claim for refund, in the 1937 protest, in the 1940 protest, or in any other papers filed or submitted to the Commissioner of Internal Revenue, the Collector of Internal Revenue or any revenue agent prior to the commencement of this action. The same is true with regard to the contention made at the trial that appellee used her separate funds for the payment of insurance

premiums and that any of the property transferred to the trust was held by appellee and decedent as joint tenants or as tenants in common. That fact was observed and commented on by the court below when counsel for appellant proposed to introduce in evidence all of the records of the Treasury Department relative to this tax matter for the purpose of showing that nothing contained in the Government's files suggested the existence of the oral agreement or, that the insurance premiums were paid from appellee's separate funds or, that any of the trust property was ever held in joint tenancy or as tenants in common. Appellant's counsel at the trial stated [R. 323-324]:

> "* * * I might state, in answer to counsel's objection to the offer, that the purpose, of course, is to establish that the new contentions and grounds raised at the trial were not considered by the Commissioner; and that the position of plaintiff that the Commissioner, through any of his agents, has waived the variance between the refund claim and the suit by considering these new grounds, does not exist; that is, that the new questions were not considered by the department and the defense of the variance thereby waived. And in order to do that it is necessary, of course, to prove a negative fact, to introduce all of the files in this case. Whether they are the files of the technical staff, whether they are the files of the revenue agent, or whether they are the files from the Commissioner's office in Washington, all will have to be introduced to negative the contention now made by the plaintiff that the defense of variance was waived by the Commissioner."

The District Court then commented as follows [R. 324, 326]:

> "Mr. Mitchell, what evidence on the part of the plaintiff is there here that the Commissioner waived that? I do not recall any testimony on the part of the plaintiff.
>
> * * * * * * * *
>
> The point is, I do not recall any testimony, Mr. Mitchell, that has been tendered here by the plaintiff that the matters that you are mentioning were considered by the Commissioner. We have the Commissioner's letters, they are clear, and that is all that we have, and they state the grounds upon which he decided these questions. * * *
>
> * * * * * * * *
>
> I will admit the exhibit for the limited purpose offered, that the confidential files do not show that there was any discussion by the Commissioner of the grounds suggested by counsel.
>
> However, as I state again, I do not recall any evidence in the plaintiff's case, but for that limited purpose the exhibit will be admitted. * * *"

The only evidence, relative to the point, introduced in evidence by appellee, subsequent to the court's comments above, was appellant's pre-trial brief, filed in the District Court, which contained reference to the issues presented at the trial. [R. 441.] The material in appellant's pre-trial brief relative to the issues not presented in the claim for refund was put in the brief because counsel for appellee requested counsel for appellant to enter into a stipulation shortly prior to the pre-trial hearing, relative to the newly presented issues. [R. 442-443.]

Throughout the entire trial counsel for appellant objected to any evidence relative to the oral agreement of 1906, relative to the payment of insurance premiums from appellee's separate funds, and relative to the property held in joint tenancy or tenancy in common prior to its transfer in trust, on the grounds that the suit must be based on the grounds set forth in the claim for refund and that the court was without jurisdiction to consider different grounds or issues. [R. 77, 84-88, 93, 96, 149-150, 169-170, 173-174, 179, 183-184, 185, 189, 199-201, 203, 207, 229, 324-326, 430.]

The record will show that revenue agents were assigned to investigate the federal estate tax return, the claim for refund, and the protests filed by appellee. Ample opportunity was afforded appellee, other members of decedent's family and appellee's counsel to make known to the agents the matters, grounds and issues subsequently presented by appellee at the trial. No information of any kind, regarding the oral agreement of 1906, or the property held in joint tenancy or tenancy in common, was given by any one to any of the investigating agents. [R. 248-249, 266-267, 327, 351-352, 356, 430.]

The reason why the claim for refund, protests and complaint or amended complaint did not refer to or even suggest the existence of the oral agreement of 1906, is quite evident. Appellee testified on cross-examination [R. 307] that she told her counsel for the first time of the existence of the oral agreement "about eight weeks ago," or only eight weeks prior to the trial of the case. The

District Court later in the trial commented on appellee's testimony as follows [R. 330]:

> "Mrs. Ferry herself has stated that the first time she mentioned that [referring to the agreement of 1906] was some eight weeks before this trial."

The court further stated [R. 331]:

> "Aren't we bound by the two instruments, the claim and the amendment to the claim? [Referring to the protest of April 4, 1940.] Can we read anything into them that is not there?"

If anything further is needed to show that the oral agreement of 1906 was a mere afterthought and presented for the first time at the trial, we need only examine the federal estate tax return where appellee stated that decedent [R. 608] "desired to and did by the creation of these trusts enter into a property settlement with his wife" and her statement [R. 609] that:

> "It is further contended that the interest retained by Catherine B. Ferry in the trusts hereinbefore set forth was not transferred to her by decedent but represents the community property acquired by decedent and Catherine B. Ferry since their marriage. * * *"

Appellee's execution of the trust indentures, as one of the trustors, is explained by her statement in the federal estate tax return [R. 609]:

> "That it was necessary, and affiant, Catherine B. Ferry, did, join in the creating of these trusts, hereinbefore set forth and in so creating these instruments affiant received only that which was already her property pursuant to the laws of the State of California. [Meaning, of course, the laws with regard to community property.] * * *"

It is also significant that appellee made no claim in the return, claim for refund, protests, or otherwise that she was entitled to one-half of the stocks, bonds, cash or to the other property standing in the name of the decedent. If appellee had recalled the 1906 agreement at the time of the filing of the return, or the claim, or the protests, or at any time prior to the running of the statute of limitations for the filing of a claim for refund, she would have asserted her rights to one-half of all the property shown in the federal estate tax return. The findings of the District Court in this case would have entitled her to do so.

As pointed out to the District Court [R. 430], no evidence was produced to show that any of the premiums on the life insurance were paid from community property of the so-called vested type acquired after the effective date of Section 161(a) of the California Civil Code and the District Court made no finding to the contrary. As to appellee's burden of proof see *Rule v. United States* (C. Cls.), decided December 3, 1945 (1945 C. C. H. Inheritance, Estate and Gift Tax Service, par. 10,241). It is equally clear that judgment for appellee cannot be sustained on the grounds that the mere execution of the trust indentures gave rise at that time to a division of the trust property such as to make her a contributor of one-half of the corpora of the trusts. The entire record indicates that appellee abandoned that contention. Furthermore, her execution of the trust indentures was required

by the trustees because the trusts contained California community property (acquired prior to the effective date of Section 161(a) of the California Civil Code). That is the substance of appellee's statement in the federal estate tax return. [R. 609.] As above stated, the claim and protests were not based on, nor did they refer to, the fact that some of the properties transferred in trust were held prior thereto by appellee and decedent as joint tenants or tenants in common. The District Court erred in admitting any evidence relative thereto; furthermore, so far as the claim and supporting papers are concerned, appellee made no contribution toward the purchase of any of the properties. Consequently, the entire value of the properties so held would have been included in decedent's taxable estate had they not been transferred to a taxable trust. See *Tyler v. United States,* 281 U. S. 497; *United States v. Jacobs,* 306 U. S. 363.

The District Court erred in admitting any evidence on issues not raised in the claim for refund; that is, the court should have excluded any evidence relative to the oral agreement of 1906, to the payment by appellee of the insurance premiums from her separate funds, and any evidence relative to property held by appellee and decedent as joint tenants or tenants in common. The District Court erred in making any findings relative to those issues and erred in making the finding that the Commissioner was apprised of and considered such issues.

Conclusion.

The entire judgment of the District Court, except the portion thereof relating to trust No. 1080 concerning which no appeal was taken, should be reversed.

Respectfully submitted,

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